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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 179

UNITED STATES OF AMERICA, PETITIONER

v.

S. S. AUSTRALIA STAR ET AL.,
AND SIX OTHER PROCEEDINGS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cases on February 9, 1949.

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of New York (R. 590-604) is reported at 74 F. Supp. 145. The opinion of the United States Court of Appeals for the Second Circuit (R. 655-662) is reported at 172 F. 2d 472.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1949. By order of Justice Jackson, dated April 30, 1949, the time for filing a petition for a writ of certiorari was extended to and including July 8, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

During the war, a collision occurred between the United States-owned *S. S. Hindoo,* which was being escorted by U. S. Navy Craft. *P. C.*[1] *616,* and the *S. S. Australia Star,* owned by a British corporation, under circumstances in which the two courts below held both colliding vessels at fault for errors in navigation. The *P. C. 616* had unsuccessfully sought to advise the *Australia Star* by blinkers to keep clear of the *Hindoo,* but took no other affirmative action to prevent their collision. The collision resulted in (1) loss of the *Hindoo* and her privately owned cargo and (2) damage to the *Australia Star* and her privately owned cargo.

The principal question presented is whether the *P. C. 616*—a public vessel of the United States engaged in the exclusively military operation of escorting an American merchant ship to protect it against enemy attack—owed a duty to take positive action to prevent collision between the ship

[1] The descriptive letters, "P. C.", are used to refer to the Navy's Patrol Submarine Chasers (R. 176). See Knight, *Modern Seamanship* (11th ed.) 4.

it was escorting and a friendly vessel encountered en route, for breach of which duty the United States may be held liable under the Public Vessels Act to the cargo and merchant vessel owners.[2]

STATUTES INVOLVED

1. Sections 1, 2, and 5 of the Public Vessels Act (43 Stat. 1112, 46 U. S. C. 781, 782, 785) provide, in pertinent part:

> Section 1. A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: * * *.
>
> Section 2. * * * Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment

[2] Should certiorari be granted the United States will also urge the following additional questions: (2) Whether the United States, because of its failure to surrender the value of the escorting war vessel (*P. C. 616*), in addition to that of the convoyed vessel (*Hindoo*), is precluded from limiting its liability under R. S. 4283(a); (3) Whether the owner of the *Australia Star*, a British corporation, may maintain its cross-libel under the Public Vessels Act despite its failure to allege or prove foreign reciprocity as required by Section 5 of that Act.

thereof, in so far as the same are not inconsistent herewith, * * *.

Section 5. No suit may be brought under this Act by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts.

2. Sections 2 and 3 of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 742, 743) provide, in pertinent part:

SEC. 2. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * *.

SEC. 3. Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * *

3. Section 4283(a) of the Revised Statutes, as amended (49 Stat. 1479, 46 U. S. C. 183(a)) provides, in pertinent part:

Section 4283(a). The liability of the owner of any vessel, * * * for any loss, damage, or injury by collision, * * * shall not, * * * exceed the amount or value of the

interest of such owner in such vessel, and her freight then pending.

STATEMENT

These seven proceedings, which were consolidated for trial and appeal, arise out of a collision between the *S. S. Hindoo* and the *S. S. Australia Star* in the Caribbean Sea, on the night of September 9, 1944 (R. 606, 656). Having separated from a larger convoy, the *Hindoo,* a merchant ship owned by the United States and bound for Cartagena, Colombia, at a speed of 10 knots, was being escorted by a United States naval vessel, the *P. C. 616* (R. 181, 606-607, 656). The *P. C. 616,* whose orders were to patrol the area "in such manner as to be assured that enemy submarines are not in the waters through which [the *Hindoo*] will pass,"[3] was preceding the *Hindoo* on a zigzag course at 12 knots (R. 182, 607). The *Australia Star,* a merchant ship owned by Frederick Leyland & Co., Ltd., a British corporation, was traveling to Cristobal at a speed of 15 knots (R. 606, 656). In view of the suspected "presence of enemy underseas craft," all three vessels, in accordance with wartime security practice, were proceeding blacked out (R. 606, 656).

The *Australia Star,* being equipped with radar, learned of the presence of both the *P. C. 616* and the *Hindoo* somewhere on her starboard bow about 28 minutes before the collision (R. 279, 592, 606,

[3] See Appendix, *infra,* p. 20.

608, 656, 658). Shortly thereafter, the *P. C. 616,* which was also equipped with radar, discovered the *Australia Star's* presence, required her to identify herself, and then attempted to signal her by blinkers to keep clear of the *Hindoo* (R. 176, 609, 658). The *Australia Star,* however, was unable to grasp the entire blinker message (R. 285, 609, 658).

About 12 minutes before the impact the *Australia Star* threw on her navigation lights, including her red and green side lights and her white range lights (R. 286, 609, 656, 658-659). The radarless *Hindoo* saw, but misunderstood, the green lights during about 10 minutes preceding the collision and did not become conscious of the presence of the *Australia Star* until a minute before the collision when she switched on her own lights and went hard right (R. 607, 656, 657-658). The collision could not then be avoided, and the bow of the *Australia Star,* whose speed had at no time been decreased, rammed the *Hindoo's* port-side, causing her to sink within a few minutes and to become, with her cargo, a total loss (R. 607, 609, 611, 656). The *Australia Star* and her cargo also suffered damage (R. 612, 656).

On October 19, 1944, the United States, as owner of the *Hindoo,* filed a libel against the *Australia Star* and Leyland, her owner, alleging negligence in the navigation of the *Australia Star* and claim-

ing $300,000 in damages for loss of the *Hindoo* (R. 15-18). Leyland then filed a cross libel under the Suits in Admiralty and Public Vessels Acts[4] against the United States, as owners of both the *Hindoo* and *P. C. 616,* alleging that both Government vessels negligently contributed to the collision, and claiming $400,000 for damages to the *Australia Star* (R. 27-34). The United States also filed, as owner of the *Hindoo,* a petition for exoneration from or limitation of liability (R. 42-48). These proceedings were all instituted in the United States District Court for the Southern District of New York.

Several cargo claimants also filed suit in that court:

(1) Schwab Bros. Corp. and others, as owners of cargo on the *Hindoo,* filed a libel against the *Australia Star* and Leyland, claiming $600,000 in damages (R. 62-66). In that suit, Leyland, by petition, sought to implead the United States, under the Public Vessels Act, as owner of the *P. C. 616* (R. 77-84).

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[4] The Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 741) confers the right to sue the United States only in those situations where the United States-owned vessel "is employed as a merchant vessel" (Section 2, 46 U. S. C. 742). Where the United States-owned ship is employed as a public vessel, suit must be brought under the Public Vessels Act (43 Stat. 1112, 46 U. S. C. 781). See *The Western Maid,* 257 U. S. 419, 431; *Bradey* v. *United States,* 151 F. 2d 742 (C. A. 2), certiorari denied, 326 U. S. 795.

(2) The same cargo owners also filed a separate libel against the United States, under the Public Vessels Act, as owner of the *P. C. 616,* claiming the same $600,000 in damages (R. 121-125). The United States petitioned to implead the *Australia Star* and Leyland in this suit (R. 139-142).

(3) Wessel, Duval & Co., Inc., and several other owners of cargo on the *Hindoo,* also filed a libel against the *Australia Star* and Leyland, claiming over $26,000 in damages (R. 89-96). In this suit, too, Leyland petitioned to implead the United States, under the Public Vessels Act, as owner of the *P. C. 616* (R. 109-116).

(4) Siemens Bros. and others, owners of cargo on the *Australia Star,* filed a libel against the United States, under the Public Vessels Act, as owner of the *P. C. 616* (R. 150-154).

After answers and impleading petitions were filed (R. 1-13), all seven proceedings were consolidated for purposes of trial (R. 160). At the conclusion of the trial, the district court held the *Hindoo* at fault for failure to see the lights of the *Australia Star* in time to take action to avert the collision,[5] and the *Australia Star* at fault for not getting more information by use of its radar after its navigation lights were turned on (R. 591-

[5] No question is raised or presented concerning the findings below as to the government-owned *Hindoo's* negligence.

599). It exonerated the *P. C. 616*, finding that (1) she gave no order which caused or contributed to the collision; (2) neither of the colliding vessels was induced to navigate less carefully by the presence of the *P. C. 616;* (3) the presence and actions of the *P. C. 616* put the *Australia Star* in no worse position than if the *P. C. 616* were not there at all; (4) the *P. C. 616's* conduct was not a proximate cause of the collision and (5) her failure to ring a warning bell, or take any other affirmative precaution to avoid the accident, was not such negligence as the *Australia Star* or the *Hindoo's* cargo owners could complain of (R. 599-604; 611, 612). The district court also granted the petition of the United States for limitation of its liability to the value of the pending freight and other earnings of the *Hindoo* (R. 613-617). The *Australia Star* and *Hindoo* were directed to divide damages and the cargo claims were ordered disposed of accordingly (R. 604).

The Court of Appeals affirmed the holdings as to the negligence of both the *Hindoo* and *Australia Star,* but reversed as to the *P. C. 616's* exoneration from liability. It held that the failure of the *P. C. 616's* commanding officer "to signal the *Hindoo* or to give warning to the *Australia Star* . . . [constituted] . . . negligence for which the *P. C. 616* should be held accountable [under the Public Vessels Act] not only to the

Hindoo, but to the *Australia Star* . . ." (R. 662). The court did not, however, overturn the district court's findings numbered (1), (2), and (3) above. The Court of Appeals also reversed the district court's granting of limitation of liability to the value of the *Hindoo's* freight and ordered, in view of its holding that the *P. C. 616* was also negligent, that the "owner of the *Australia Star* should bear one-third of the liability and the United States two-thirds, without limitation of liability" (R. 662). With respect to the cross-libel filed by the British owner of the *Australia Star,* the court below ruled that Leyland's failure to prove "international reciprocity" as required by Section 5 of the Public Vessels Act, does not bar its suit against the *P. C. 616* under the Public Vessels Act (R. 662).

REASONS FOR GRANTING THE WRIT

The decision below, making the United States the supervisor of the proper navigation in wartime not only of all vessels escorted, but also of all vessels encountering them, is, we believe, of such far-reaching importance as to require review by this Court. To meet the menace to our merchant marine of enemy attacks, the United States during the late war adopted the policy of providing armed escort vessels to furnish protection to convoys of merchant vessels. This was a wartime operation, exclusively military in character, whose sole purpose was to meet and defeat the enemies' submarine and air

offensive.[6] The court below, citing this Court's decision in *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, has now held that the United States has accepted liability, not only for damages caused by the faulty navigation or operation of a public vessel while engaged in military escort operations, but also for failure of the officers of such escort vessel to supervise with a high degree of care the navigation of the escorted merchant vessels so as to prevent collision between them and any other vessels they may meet.

We submit that there is nothing in the *Canadian Aviator* case nor in the Public Vessels Act which justifies a holding that, in the carrying out of its wartime military operations, the United States has assumed an obligation to exercise care to protect third persons from the navigational faults of other vessels and to respond in damages for a failure so to do, especially in military relationships

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[6] In World War II, the Navy escorted vessels and cargoes valued at billions of dollars. Over the North and Mid-Atlantic alone, during the years 1942 to 1945, 8,000 Navy vessels escorted nearly 50,000 ships. In addition to losses caused by enemy action, heavy losses resulted from collisions because vessels in convoy, in order to avoid detection by the enemy, operated blacked-out, using no navigation lights, navigated in close proximity to each other and at much higher speeds than would be customary in peacetime. In many of these cases, it would be possible (assuming that a duty of supervision existed) to discover that wartime-trained naval personnel on the naval escorts were negligent in some aspect or did not, in every case, take all possible affirmative steps to prevent a collision between two other vessels. The same would undoubtedly be true if escorting were ever undertaken again, unless far-reaching, burdensome and detrimental changes were made in convoy and escort practices and procedures.

like those here involved which could not exist between private parties.

1. In *Canadian Aviator,* this Court held that the public vessel while not colliding with the *Cavelier,* the damaged vessel, was in effect the physical agent which damaged the *Cavelier* by piloting and indeed practically towing it upon a submerged wreck, 324 U. S. 215, 229.[7] In defining the jurisdictional reach of the Act, the Court stated that it "extends to cases where the negligence of the personnel of a public vessel in the operation of the vessel causes damage to other ships, their cargoes, and personnel, regardless of physical contact between the two ships," but at the same time it was expressly recognized that the Public Vessels Act basically conditions maintenance of suit upon a showing that the "principles of admiralty law [would] impose liability on private parties" (324 U. S. 215, 224-225).

In admiralty, as at common law, an action predicated upon negligence may be maintained only where (1) a duty to exercise care is imposed by law in favor of the person who has suffered damages; (2) there has been a negligent failure to perform that duty; and (3) the damages ensuing were

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[7] The Reply Brief for Petitioner in the *Canadian Aviator* case (No. 279, Oct. Term, 1944) stated that "the fact remains that the *YP 249* [the public vessel], a legal entity in the admiralty, physically, by her own movements, led the *Cavelier* into collision with the submerged wreck and therby 'caused' the damage in suit" (p. 2).

proximately caused by that negligent failure. *Owners of Brig. James Gray* v. *Owners of Ship John Fraser,* 21 How. 184, 194; *Sturgis* v. *Boyer,* 24 How. 110, 124; *The Morning Light,* 2 Wall. 550, 560; *The Pleiades,* 9 F. 2d 804 (C. A. 2), certiorari denied, 270 U. S. 662; *The Perseverance,* 63 F. 2d 788 (C. A. 2), certiorari denied, 289 U. S. 744. See *Heald* v. *Milburn,* 125 F. 2d 8, 11 (C. A. 7), certiorari denied, 316 U. S. 681; cf. *Desroschers* v. *United States,* 105 F. 2d 919 (C. A. 2), certiorari denied, 308 U. S. 519.

In the instant case, there was a complete absence of legal duty as well as of proximate causation. The sole duty assumed by the *P. C. 616,* and the only reason for its presence, was the military obligation to protect the *Hindoo* from enemy attack. The "Escort Group Standard Sortie Order" issued to the *P. C. 616* (reprinted in the Appendix, *infra,* p. 20) simply directed it to patrol the area so "as to be assured that enemy submarines are not in the waters through which the vessels of the convoy will pass." The Chief of Naval Operations has stated, as the general principle of convoy operations, that "the purpose of the presence of the naval escort was to afford military protection and defense against enemy action—to provide military security," that "In instituting the convoy system, the Navy Department did not contemplate that the naval escorts would assume any responsibility for the navigation of the merchant vessels or

incur any legal liabilities arising out of the failure of such vessels to navigate safely or to avoid collision," and that "the naval escort did not, in any manner, assume liability to or responsibility for the navigation of or for the handling of the escorted vessels."[8] Thus, to the *Hindoo* the *P. C. 616* owed only the military duty of protecting and warning her against danger from the enemy.[9] With respect to the *Australia Star,* as pointed out by the district court, the escort owed "no duty but that of observing the Rules of Navigation" (R. 603).

Liability was not imposed by the court below for any failure to perform either of these duties, but rather because, in its opinion, the *P. C. 616,* on the

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[8] Communication from the Chief of Naval Operations to the Judge Advocate General of the Navy, dated March 10, 1949, Subject: "Convoy Procedure."

In order to make the escort's duty as explicit as possible the Navy's "Routing and Reporting Instructions, 1948" (R. A. R. I.) now contains the following statement with respect to the relationship between a naval escort and the escorted vessel: "The purpose of the presence of the escort is to afford military protection and defense against enemy action. The escort's functions are to provide military security. The escort does not, in any manner, assume liability to or responsibility for the navigation of or the conduct of the escorted vessels."

[9] The court below placed the wrong emphasis on the general testimony of the escort commander that "It was my duty to do what in my judgment would safeguard the *Hindoo,*" and that he had authority to give an emergency wartime order to any Allied merchant vessel (R. 660, 224). His only specific instructions concerned "conduct of a convoy with respect to maneuvering the ship to protect the convoy from enemy action" (R. 181), and in the light of this fact, as well as of the official Navy policy outlined above, these general statements on cross-examination, overly stressed by the Court of Appeals, can mean no more than that the *P. C. 616* had full authority to accomplish its military mission of protecting the convoyed vessel from attack.

basis of the information available to it, should have taken more positive steps to supervise the navigation not alone of the escorted *Hindoo,* but also of the *Australia Star,* and to warn both of them of the imminence of collision with each other. It follows, however, from the legal relationships of the vessels, that even if the *P. C. 616* had full realization that only action on its part could avert a collision, still it was under no legal duty to take affirmative action to direct and supervise the navigation of either the *Australia Star* or the *Hindoo.* Cf. *C. & O. R. Co.* v. *Mihas,* 280 U. S. 102; Restatement, Torts, Section 314. The conduct of the *P. C. 616* can no more be considered as negligence than could the failure of the operator of a loudspeaker-equipped sound truck to notify two other motorists that they might collide be deemed want of due care. The failure on the part of the naval personnel aboard the *P. C. 616* to give more positive warnings and supervise the navigation of the merchant vessels constituted no breach of naval regulations, and *a fortiori* involved no violation of a litigable duty imposed by law in favor of the third parties who seek damages here. Accordingly, under the principles of the *Canadian Aviator* case, there does not exist the type of liability giving rise to a cause of action so as to fall within the jurisdiction conferred by the Public Vessels Act.[10]

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[10] The trial court's decision in *The Sobieski,* 81 Lloyds List L. R. 51, relied upon by the court below as "closely in point"

This conclusion that liability cannot be imposed on the *P. C. 616* is reinforced by the undisputed fact that that vessel took no action which affected the collision in any way. The district court found that (1) the *P. C. 616* gave no orders which caused or contributed to the collision between the *Hindoo* and the *Australia Star;* (2) neither of the two merchant ships was induced by the presence of the *P. C. 616* to navigate less carefully; (3) the presence and actions of the *P. C. 616* put the *Australia Star* in no worse position than if the *P. C. 616* was not there at all; (4) and that the *P. C. 616's* conduct was not a proximate cause of the collision (R. 611).[11] As stated by the district court, "there is

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(R. 660), was reversed by the British Court of Appeal on a ground not pertinent here. 82 Lloyds List L. R. 370. On the point involved in this case, the *Sobieski* is clearly distinguishable since the escort commander testified that he had expressly informed the convoyed ship that he would inform it "in the event of unexpected dangers * * * as I had radar and navigational aids with which he was not fitted," and the Court of Appeal held only that the naval officer "had a duty * * * to exercise reasonable care in the performance of *the task which he had undertaken to perform,* namely, to inform the master of any expected dangers to his ship, which he could detect by his radar but of which the master remained ignorant in the fog." 82 Lloyds List L. R. 376, 381. [Italics supplied.] The Court of Appeal's reversal was placed on the ground that the Maritime Conventions Act, 1911 (providing for divided damages in collision cases) did not apply, and that the negligence of the escort commander was a common-law tort, for which the owners of the *Sobieski,* which itself was negligent, could not recover because of the common law rule as to contributory negligence.

[11] The court below did not overturn any of these findings. It did hold, however, that the failure of the escort commander to take more affirmative action "contributed to the disaster" (R. 660), and this may be taken as reversing Judge Rifkind's ultimate finding of lack of proximate cause.

no contention that the *P. C. 616* did anything to cause the accident" (R. 599). Moreover, the master of the *Australia Star* testified that even if the *P. C. 616* had issued a direct order to him, he would, before even making any attempts to comply, have made an independent determination as to the advisability of complying.[12]

2. Even if the commander of the *P. C. 616* breached his military orders in failing to take sufficient action to prevent the accident, there can be no recovery under the Public Vessels Act.[13] As we have pointed out (*supra*, pp. 12-13), that Act was designed to supplement and amend the Suits in Admiralty Act so as "to impose on the United States the same liability * * * as is imposed by the admiralty law on the private shipowner." *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 228. The United States consented to be sued for the maritime torts of its public vessels in the same manner and to the same extent that it had theretofore consented to suit for the maritime

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[12] The master of the *Australia Star*, in response to a question as to what he would have done "upon receiving orders from the escort" testified that "* * * you can't just act because somebody asks you to do something else, you just got to wait and see, weigh it up a couple of minutes" (R. 347).

[13] See *King* v. *Anthony*, Can. Sup. Ct. 569 (1946), where the Supreme Court of Canada in construing a statute similar to our Federal Tort Claims Act, held that the failure of a sergeant to restrain a private from shooting at, and damaging, a privately owned barn, while constituting a breach of military regulations, was not actionable under the Canadian statute.

torts of its merchant vessels. *State of Maine* v. *United States,* 45 F. Supp. 35, 37 (D. Maine), affirmed, 134 F. 2d 574 (C. A. 1), certiorari denied, 319 U. S. 772. The Public Vessels Act provides that a libel *in personam* in admiralty may be brought against the United States for damages caused by a public vessel of the United States, and that such suits shall be subject to and proceed in accordance with the provisions of the Suits in Admiralty Act. That Act, *supra,* p. 4, in turn, provides: "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

It is, therefore, clear that the United States in the Public Vessels Act, while subjecting itself to suit, did not create new and independent causes of action against itself for breach of public duties markedly different from those imposed upon private vessels. It was only for causes of action such as might exist between private parties that the United States assumed liability. And since military obligations are unique to Government service, no liability was assumed for their breach.

This result is likewise required by the traditional and uniform treatment of claims against the United States arising out of combat activities. Prior to the decision below, attempts to burden the Government with losses incident to military operations

had been consistently rejected.[14] *Respublica* v. *Sparhawk*, 1 Dall. 357; *United States* v. *Pacific Railroad*, 120 U. S. 227, 234; *Hijo* v. *United States*, 194 U. S. 315; *Herrara* v. *United States*, 222 U. S. 558; *Juragua Iron Co.* v. *United States*, 212 U. S. 297; *Perrin* v. *United States*, 4 C. Cls. 543, 12 Wall. 315; accord: Nielsen, *American-Turkish Claims Settlement, Opinions & Report*, p. 23 (1937); see 5 Hackworth, *Digest of International Law*, p. 687; cf. *Lichter* v. *United States*, 334 U. S. 742. Nothing in the legislative history of the Public Vessels Act justifies a different result, and such losses may not, we submit, be considered actionable in suits under that Act. This view conforms to recent congressional affirmation, in the Tort Claims Act, of the well-established policy of excluding war losses from suit out of abundant caution. That Act specifically excepts "any claim arising out of the combatant activities of the military or naval forces * * * during time of war" (28 U. S. C. 2680).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1949.

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[14] A naval escort protecting its convoy from enemy submarines is clearly engaging in warlike operations. See *Attorney General* v. *Ard Coasters*, 2 A. C. 141, 151 (1921); 2 Oppenheim, *International Law* (6th ed., Lauterpacht, 1940) 716.

APPENDIX

Escort Group Standard Sortie Order

1. Escort groups of convoys sailing from Gtmo., shall get underway in such time as to permit the last escort to stand out of the gates one-half (½) hour prior to the time specified for the convoy to depart. The time of departure of convoys is shown on the Port Director's SECRET form subject, "Routing Instructions" a copy of which is furnished each escort.

2. Upon clearing the harbor net defenses, the Escort Commander will dispose his forces so as to provide protection to the vessels of the convey upon its sortie.

3. After escort vessels have been assigned stations they shall patrol their areas in such manner as to be assured that enemy submarines are not in the waters through which the vessels of the convoy will pass. In the event that a contact is made the vessel making it will attack and the adjoining escorts assisting only if necessary. Care must be taken by escort units not to leave their group. Every contact shall be attacked by dropping charges in accordance with existing doctrine. Even on doubtful contacts one or two charges will be dropped.

4. After the convoy has cleared the harbor escort vessels will take assigned stations and proceed with the convoy.

(S.) E. F. JENKINS,
Lieut., Comdr., U.S.N.R.
Operations Officer.

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IN THE

Supreme Court of the United States

No. 179—October Term, 1949.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

S.S. AUSTRALIA STAR et al.,
And Six Other Proceedings.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE *S.S. AUSTRALIA STAR* AND FREDERICK LEYLAND & CO. LTD., RESPONDENT, IN OPPOSITION.

ROBERT S. ERSKINE,
Counsel for Respondent, Frederick Leyland & Co. Ltd. and S.S. Australia Star.

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STATEMENT.

1. *The Nature of the Case.*

The opinion below is reported at 172 F. (2d) 472. The opinion of the District Court, Southern District of New York, is reported at 74 F. Supp. 145.

Both of those opinions disclose that this is essentially a case of a marine collision on the night of September 9th, 1944, involving the respondent's steamer *Australia Star,*

petitioner's merchantman *Hindoo,* and petitioner's naval vessel *PC-616,* which was escorting the *Hindoo.*

Like any other collision case, the basic question is the negligence of the persons in charge of the several vessels which caused or contributed to the collision.

The "key" fact of the case is that, although the vessels were originally proceeding at night without showing any lights, in accordance with wartime practice, the *Australia Star* switched on her two white range (masthead) lights and her red and green side lights, at full brilliance, 12 minutes before the collision, when she and the *Hindoo* were 3 to 4 miles from each other. From that fact, which was corroborated by the *PC-616* and found by both courts (R. 607, 656), stems the negligence of the *Hindoo* and the *PC-616.* The *Hindoo* was held in fault for her admitted failure to see and heed the *Australia Star's* navigating lights and for continuing blacked out, at full speed, until she suddenly appeared out of the darkness, in the act of throwing herself into collision across the bow of the lighted *Australia Star* (R. 657-658). The *PC-616* was held in fault for her failure to signal the warnings or orders, which she could and should have given, to either of the other vessels when she admittedly saw, by her radar, that her darkened convoy, the *Hindoo,* maintaining the course and speed previously ordered by the *PC-616,* was standing into collision with the *Australia Star,* in blind disregard of the latter's lights (R. 659-660).

The lower court affirmed the contributory negligence of the *Australia Star* on the ground that, although her master had switched on her navigating lights 12 minutes before collision, and although the earlier reports from his radar operator had indicated that the vessels were not on collision courses, he was negligent in not asking his radar

operator for additional reports which might have disclosed the danger of collision created by the faulty navigation of the unlighted *Hindoo* (R. 659).

Petitioner does not now question the negligence found against the *Hindoo* (petition, p. 8, footnote), but seeks a review by this Court in an effort to exonerate the *PC-616*.

2. *Outline of the Proofs.*

The *PC-616* and *Hindoo,* having been in a group convoy starting from Guantanamo Bay, Cuba, were detached therefrom on the morning of September 9, 1944, under orders to proceed independently to Cartagena, Colombia (R. 176). Those orders, if in writing, were not disclosed herein. It is self-evident that they were not included in the *unproven new matter* now injected into the petition, as an appendix thereto. However, the Commanding Officer* of the *PC-616* testified that, under those orders, her duties included not only protection against enemy attack but also direction of the *Hindoo's* navigation by fixing the base course and speed, the duty to safeguard the *Hindoo,* and the responsibility to get her to her destination safely (R. 182-224). In the performance of those duties, he had wartime authority to give an emergency order to any Allied merchant vessel (R. 224). Before leaving Cuba, he had been supplied with information regarding Allied vessels which would be proceeding, blacked out at night, through the general area (R. 226). Such information was presumably furnished to aid the PC-616 in guarding against the dangers of night time

* The Commanding Officer naturally testified regarding "his" orders and "his" duties; but it is sufficiently evident that it was the *PC-616*, with all of her complement and equipment, that was ordered to escort the *Hindoo* and not merely the individual who happened to be in command at the time. As this Court stated in *Canadian Aviator Ltd.* v. *United States,* 324 U. S. 215, at 224, the *in rem* principles of Admiralty treat a vessel as a juristic person, liable for acts and *omissions* brought about by her personnel.

collision with darkened allied vessels known to be in those waters.

The fact that the *PC-616's* duties were properly understood and described by her Commanding Officer must be inferred from the petitioner's failure to offer any proofs in contradiction of his testimony.

In addition to her military armament, the *PC-616* had elaborate equipment of signal lamps, signal lights, searchlights, siren, radio, and a loud speaker for means of communication by signal or voice, and also radar equipment for detecting the distant approach of surface craft (R. 178-181). Her radar antenna was operated mechanically, making a complete sweep of the horizon every few seconds, and giving a steady "sight" of objects in all directions (R. 216).

Some 23 minutes before collision, while the *Hindoo* was maintaining a base course of 108° true and a speed of 10 knots, *as ordered by the PC-616,* the latter's radar picked up, at a distance of 8 miles, an object which later proved to be the *Australia Star* (R. 182, 586). The *PC-616* could and should have determined by radar that the *Australia Star* was approaching on a course which, projected, would cross the course of the *Hindoo;** but, without alerting the *Hindoo's* men as to the approach of another vessel and the possible necessity of altering course or speed to avoid collision, the *PC-616* speeded across the path of the on-coming *Australia Star,* thus putting herself and her convoy on opposite sides thereof (R. 210).

When the *PC-616* was crossing ahead, and after she was off the port bow of the *Australia Star,* she "blinkered" to that vessel a "challenge", in reply to which the *Australia Star* "blinkered" her call sign, thus identifying herself as

* The *Australia Star* was then on a course 237° true (R. 281).

a friendly vessel (R. 185, 349). While drawing off the port side of the *Australia Star,* the *PC-616* began "blinkering" a message "Keep clear", of which the *Australia Star* was able to decipher only the first word, probably because of the unorthodox technique of the *PC-616's* signalman (R. 343, 350, 264-265).* The *Australia Star* kept signalling for repetition of the message so that the *PC-616* was fully aware that her message had not "gotten through" or been deciphered (R. 192-194, 264-265, 350-351).

While the "blinkering" was in process, the *PC-616* saw the *Australia Star* turn on her navigating lights (R. 586); and, from that moment, the *PC-616* knew from her radar that the darkened *Hindoo,* maintaining the course and speed which the *PC-616* had ordered, was standing on into collision, in blind disregard of the navigating lights of the *Australia Star* (R. 222, 580, 589). The Commanding Officer of the *PC-616* admittedly realized that something was wrong. He thought that the *Hindoo* either had failed to see or had misunderstood the lights of the *Australia Star* (R. 212-213). Some 5 minutes before collision, he became alarmed, but did nothing except continue the undecipherable "blinkering" to the *Australia Star.* Finally, when the two merchantmen were in the jaws of collision, the *PC-616* threw a searchlight upon the *Hindoo,* but too late to avoid disaster (R. 196-197).

The *PC-616* could handily have stood over and communicated with the *Australia Star* by loud speaker (R. 225). Moreover, either of the two merchant vessels could have been ordered quickly to stop by the international danger signals "U" or "K", each of which is a 3-flash signal, easily given in a few seconds by Aldis lamp, signal light, search-

* As bearing on the negligence of the *PC-616,* she had no reason to assume that such a message would have been of any help, even if it had been deciphered, because it did not indicate what the *Australia Star* was to keep clear of, or how she was to do it.

light, or whistle, and easily read and immediately understood (R. 218, 324, 340, 344). Neither of those signals was given by the *PC-616* to either the *Hindoo* or the *Australia Star* (R. 218).

Thus, on her own testimony, although the *PC-616* had ample knowledge of the impending danger of serious disaster, she did not take any of the elementary precautions which she could and should have taken to avert it. The testimony amply supports the lower court in its statement, "We think this was negligence for which the *PC-616* should be held accountable not only to the *Hindoo* but to the *Australia Star,* which she permitted to remain a target for the onrushing darkened *Hindoo*" (R. 662).

The negligent navigation of the *Hindoo* is fully discussed in the opinion of the lower court and in the opinion of the District Court, and further discussion here may be unnecessary, particularly as the petitioner no longer questions her negligence.

The *Australia Star's* radar was a primitive type, secreted by the British Admiralty in a special structure abaft the navigating bridge. The antenna, operated by hand, required about 3 minutes for a complete sweep of the horizon, giving information only in the direction in which it might be focussed at any given time (R. 420, 421, 426, 431). Commencing 27 minutes before the collision, 3 radar reports from the radar operator indicated to the *Australia Star's* Master, by reason of changing bearings and distances, that the vessels were not on collision courses (R. 281, 284, 285, 288). Nevertheless, as an additional precaution, during the "blinkering" between his vessel and the *PC-616,* he turned on his navigating lights at full brilliance (R. 286, 314). That was done, 12 minutes before collision, according to the

Australia Star's time, as found by the lower court and the District Court (R. 286, 607, 656). When the *Hindoo* failed to turn on her navigating lights in reply, the Master of the *Australia Star,* in reliance on wartime practice, concluded that his radar information was accurate, and that the *Hindoo,* in no danger of collision, was withholding her lights rather than risk disclosure to any enemy submarine (R. 318). Because of the facts outlined above, and in view of the *PC-616's* failure to give any danger signal, the Master of the *Australia Star* was not disturbed by the difficulty of deciphering the *PC-616's* message. He had reason to believe, from previous experience, that a patrol vessel was attempting to send him some message with respect to his approach to the Canal (R. 319, 329-330). He had not the slightest reason to anticipate that the darkened *Hindoo* would navigate into collision with him, and the sudden appearance of the unlighted *Hindoo* off his starboard bow, out of the darkness, in the very jaws of collision, was a complete surprise.

The lower court affirmed the finding of the District Court that the *Australia Star* contributed to the collision on the ground that her Master, after turning on her lights, was negligent in not asking his radar operator for additional reports which might have disclosed the danger created by the *Hindoo's* faulty navigation. If, in the existing circumstances, such an omission constituted contributory negligence of the *Australia Star,* the omissions of the *PC-616* established her contributory negligence quite as strongly.

3. *The petition goes completely outside of the record in an effort to support the question presented.*

The "question presented," as stated on pages 2-3 of the petition, should be broken down into two parts, thus:

(a) that Naval vessels, when escorting wartime convoys, are under no duty whatsoever except to afford to their convoys military protection and defense against enemy action (Petition, p. 13); (b) that, therefore, no matter how negligent a Naval escort may be in failing to avert a known danger of an impending collision between her convoy and an approaching vessel, no liability can attach to the United States because there is no breach of a litigable duty (Petition, p. 15).

The pleadings filed by the United States did not plead any such contention (R. 38-39, 74-75, 136, 156), and the record is completely barren of any proof in support of the facts on which it is predicated. In contradiction of it, the Commanding Officer of the *PC-616*, a witness for the United States, testified, as outlined above, that, in escorting the *Hindoo*, the *PC-616* had duties with respect to the navigation and safety of the *Hindoo*, which, *prima facie*, were in addition to and quite apart from military protection, were not dependent upon enemy attack, and were *continuing duties* even if no enemy were encountered. In the face of that uncontradicted testimony, the petitioner has gone completely outside of the record in an effort to lend tenuous support to the "question presented". It is stated on pages 5 and 13 of the petition that the orders under which the *PC-616* was escorting the *Hindoo* were contained in the "Escort Order", appended to the petition on page 20. There is not the slightest evidence to support that statement. Moreover, that document, on its face, did *not* contain the orders under which the *PC-616* was operating at the time of this collision. It related solely to "group" maneuvers of a convoy of numerous units escorted by numerous Naval vessels while leaving Guantanamo. It is self-evident that *additional* orders must have been given when the *Hindoo* and *PC-616* were later detached from that

"group" convoy, to proceed independently to Cartagena (R. 176).

Neither do the proofs offer the slightest justification for petitioner's reference to statements issued by the Navy Department in 1948 and 1949. No proof of them was offered in this case, and there is nothing to show that they are material to the questions involved herein in any way.

This respondent respectfully submits that the petitioner is subject to the most serious criticism in the attempt to seek the aid of this Court by such unwarranted and improper methods. For that reason, even if there were no other, the petition should be denied.

4. *The District Court did not absolve the PC-616 from lack of due care.*

The District Judge itemized the precautions which the *PC-616* could have taken which might have avoided the disaster (R. 599, 602-603), but held that her failure to take them was "not such negligence as the *Australia Star* could complain of" (R. 603), because he thought that the *PC-616* had the status only of a "volunteer." Thus, when the lower court reversed the District Court as to the escort's duties and liabilities, both courts were in agreement as to lack of proper precautions by the *PC-616*.

The petition (pp. 9, 10, 16) emphasizes the District Court's comments that the *PC-616* did not bring about the collision by affirmative action: but those comments have no bearing upon the *PC-616's* liability for the precautions which she *omitted*. A vessel may be liable for faults of *omission*, as the lower court stated (R. 660, 661).

FIRST POINT.

THE QUESTION PRESENTED BY THE PETITIONER IS NOT ONLY UNSUPPORTED BY THE PROOFS BUT ALSO CONTRARY TO PREVIOUS JUDICIAL INTERPRETATIONS OF THE DUTIES OF A NAVAL ESCORT.

The petition repeatedly confuses the *purpose* of wartime convoy operations and the *duties* which devolved upon the Naval vessels in carrying out those operations. Thus, on page 10, there is the statement that the *purpose* was to meet and defeat the enemies' submarine and air offensive,—a fact which is not at issue or disputed in this litigation. But, when merchant vessels were compelled, by Government authority, to sail in convoys organized and operated by the Navy, and were compelled to submit themselves to the orders of the Naval escorts, including orders with respect to courses, speeds, blackout of lights, etc., it is certainly a *prima facie* inference that the success of those operations necessitated that the Naval escorts perform duties in addition to combatting enemy attack. What those duties were, as then known to both the escort and merchantman, is a question of fact, to be proven. The petitioner now asserts the "question presented" as though it were some sort of legal axiom requiring no more support than unwarranted references to statements made by the Navy Department in 1948 and 1949; but, as previously discussed herein, *the proofs* in this case support the decision below, and do not support the petitioner's contention.

There is serious error in the misleading and erroneous statement in the petition (p. 11) that the lower court "has now held that the United States has accepted liability * * * for failure of the officers of such escort vessel to *supervise with a high degree of care* the navigation of the escorted

merchant vessels so as to prevent collision between them and any other vessels they may meet." (Italics ours.) *The lower court made no such ruling.* If the statement quoted were correct, it could have been said that the *Hindoo* should be deemed free from fault because she was subjected to faulty supervision by the escort. But the *Hindoo* was found in fault on the basis of her own liability for faulty navigation.

The lower court, referring to the uncontradicted testimony of the *PC-616's* duties, simply held that she had a duty to make reasonable efforts to avert a collision which she knew to be impending when she saw that the darkened *Hindoo,* while maintaining the course and speed which the *PC-616* had ordered, was blindly rushing on to disaster.

Moreover, it would seem sufficiently apparent that the negligence of the *PC-616 did not* arise "out of combat activities," and that the argument and cited authorities on pages 18-19 of the petition have no relevancy to the case at bar.

In *Canadian Aviator Ltd.* v. *United States,* 324 U. S. 215, the steamship *Cavelier* was ordered by naval authorities to follow the guidance of the naval patrol boat *YP 249* in proceeding through the peaceful waters of Delaware Bay. The fault charged against the *YP 249* was that she guided the *Cavelier* so negligently that the latter struck upon a submerged wreck. This Court held that the libel stated a cause of action against the United States under the Public Vessels Act both *in personam* and *in rem.* The relationship between the *YP 249* and the *Cavelier* was that of escort and convoy, and it is self-evident that the escort's duties and responsibilities were not limited to protecting her convoy against enemy attack. If the petition seems to suggest that the duties of the escort in that case rested upon the specific orders under which she was operating, this respondent

again emphasizes that the orders to the *PC-616* were not shown, except in the admissions of her Commanding Officer that the *PC-616,* like the *YP 249, did* have duties in addition to protecting her convoy against enemy attack.

In the English case of *The Sobieski,* 81 Lloyd's List L. R. 51, the Court expressly held that the duties of a naval escort went beyond the protection of her convoy from military attack, and that "the escort was responsible for insuring in so far as possible that the convoy reached its destination safely, without sustaining damage by enemy attack or by collision with surface craft while navigating at high speed in fog." In that case the naval escort, having radar knowledge of the approach of another vessel upon a collision course, negligently failed to warn her convoy of the necessity of altering course or speed to avert collision. The finding of negligence was affirmed by the Court of Appeals, 82 Lloyd's List L. R. 370, and the ultimate disposition of the case turned upon peculiarities of the English law and procedure not pertinent to the present litigation, as the petitioner herein admits (Petition, pp. 15-16, footnote).

Other reported cases disclose that naval escorts, in addition to military protection, had further duties, particularly the duty to warn their convoys of any change of course necessary to avoid collision with an approaching vessel. *Esso Standard Oil Co.* v. *United States,* 174 F. (2d) 182, 184; *Empire Opossum,* 81 Lloyd's List L. R. 204, 212; *The Lima,* 69 Lloyd's List L. R. 111, 112; *The Delilian,* 80 Lloyd's List L. R. 448, 451-452.

SECOND POINT.

THE DECISION BELOW IS SUPPORTED BY UNCONTRADICTED PROOFS. THE CASE PRESENTS NO QUESTION OF SUCH GRAVITY OR IMPORTANCE AS TO REQUIRE A REVIEW BY THIS COURT.

For the reasons already discussed, the Court below based its decision *upon the proofs in the case* as to the duties of the three vessels and the negligent breach thereof.

Having determined that the collision resulted from the negligence of all three vessels, the Court below rightly decreed that the United States, as owner of the *Hindoo* and *PC-616,* should carry two-thirds of the total damages and the *Australia Star* one-third. The petition does not dispute that that ruling is in accordance with established law. *The Eugene F. Moran,* 212 U. S. 466, 475; *The Kookaburra,* 69 F. (2d) 71; *The Socony No. 123,* 78 F. (2d) 536; *The Norwich Victory,* 77 F. Supp. 264.

In stating that the two-thirds liability of the United States would be "without limitation of liability" (R. 662), the Court below was merely giving effect to the rule that, when two vessels of similar ownership contribute to a disaster, their owner may not seek statutory limitation of liability (46 U. S. C. A. 183) without surrendering the value of his interest in both vessels. *The Alvah H. Boushell,* 38 F. (2d) 980, 982; *The San Rafael,* 141 Fed. 270, 276.

The limitation proceedings of the United States in the present litigation were based solely upon the offer to surrender the value of its interest in the *Hindoo,* represented by pending freights in the sum of $39,498, the *Hindoo* herself having been a total loss (R. 42-48). The United States, having been held liable for the negligence of both the *PC-616* and the *Hindoo,* could not seek to limit that

liability without surrendering the value of its interest in the *PC-616* as well as the value of its interest in the *Hindoo*.

When the United States came into court and initiated the litigation herein by asserting its claim against the *Australia Star* and her owner (R. 15) the Government so far took the position of a private suitor as to agree by implication that justice be done with regard to the subject matter, —the collision. *United States* v. *Thekla*, 266 U. S. 328, 339-340; *The Steel Inventor*, 24 F. (2d) 657, 659. Section 3 of the Public Vessels Act (46 U. S. C. A. §783) recognized that rule by giving to a private owner the right to cross-libel in any suit originated by the United States.* In determining the justice of the subject matter,—the liability for the collision,—it is immaterial whether the contributory negligence of the *PC-616* arose out of a duty owed to both the *Hindoo* and the *Australia Star*, as the lower court held (R. 662), or out of a duty owed only to her convoy, the *Hindoo*. In either event, the *PC-616's* negligence contributed to the collision.

The record herein presents a situation in which the lower court, having determined the question of negligence upon the proofs, decreed the liability of the vessels and their owners in accordance with established principles. There is no reason why the case should be reviewed by this Court more than any of the numerous collision cases decided by the lower court from Term to Term.

Neither is there anything inequitable in the decision below to justify a review. No sound reason appears either within or outside of the record why the United States

* This section of the Act would be meaningless except in that it recognized the *Thekla* ruling with respect to private owners who might be unable to obtain jurisdiction in a direct suit against the United States.

should be relieved from liability for the consequences of the negligence of its servants, as to which the Public Vessels Act was intended to provide a remedy.

If the petitioner were to succeed in its effort to escape liability for the contributory negligence of the *PC-616,* the total damages would lie between the *Hindoo and the Australia Star* on the basis of "mutual fault", and each would normally be called upon to carry 50%. But the United States would then be entitled to limit its liability to the aforesaid value of its interest in the *Hindoo.* At the same time, the owners of cargo lost on the *Hindoo,* asserting damages of more than $600,000 (R. 65, 95), would be entitled to recover 100% thereof from the non-carrying vessel *Australia Star. The Sucarseco,* 294 U. S. 394, 400-401. Frederick Leyland & Co. Ltd., by reason of payment to the *Hindoo's* cargo, and the *Australia Star's* damages of upwards of $400,000 (R. 33) would be saddled with a total damage of approximately $1,000,000, without any possibility of recouping 50% from the United States, because of the latter's limitation of liability. Thus, despite the gross negligence of the *Hindoo* and the contributory negligence of the *PC-616,* the *Australia Star* and her owner would be left "holding the bag." This respondent does not suggest that liability in any case depends upon the amount involved. It *does* contend that petitioner should not be permitted to seek the aid of this Court towards such an inequitable result without submitting the strongest proofs in support of its petition. Such proofs do not exist in this case.

Conclusion.

Although the writ of certiorari is asked for herein solely on the question presented, the petitioner suggests, in a footnote, that, if the writ be granted, the United States will ask

this Court to review other questions in the case. If that be proper practice under the rules of this Court this respondent submits that it should be entitled to ask this Court to review the finding of contributory negligence of the *Australia Star*, in the event that the present petition is granted.

Nevertheless, for the reasons stated herein, the petition should be denied.

Respectfully submitted,

ROBERT S. ERSKINE
Counsel for respondent, Frederick Leyland & Co. Ltd., and *SS Australia Star*

Dated New York, July 28th, 1949.

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IN OPPOSITION

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IN OPPOSITION

Statement

The petition gives a quite erroneous statement of the issue involved in the decision of the lower court holding the "P.C.616" at fault for the collision and predicating liability of the United States thereon. The petition on page 10 states:

> "The decision below, making the United States the supervisor of the proper navigation in wartime not only of all vessels escorted, but also of all vessels encountering them, is, we believe, of such far-reaching importance as to require review by this Court."

The issue before the lower courts in so far as concerns the liability of the "P.C.616" was not whether the colliding vessels navigated improperly and whether the "P.C.616" failed to supervise their navigation, but was solely whether the "P.C.616" herself was at fault with respect to duties that rested upon the "P.C.616" in the situation which preceded the collision.

The District Court in its opinion stated in substance that the "P.C.616" was at fault but that in contemplation of law she was a stranger owing no affirmative duty to either colliding vessel. At folio 1798 of the Record that court refers to the situation of "a vessel that merely happened on the scene".

The Court of Appeals, however, unanimously reached the opposite result, disagreeing with the District Court both in conclusions of fact and of law. In its opinion (p. 660) the Court of Appeals said:

> "With this view we disagree. *The Hindoo was subject to the orders of her naval escort. Pursuant to such orders she was proceeding, blacked out, on a prescribed course of 180° true, and she could reasonably expect to be warned of any danger known to her escort which would require a departure from such orders.** The commander of the PC-616 testified that it was his responsibility to get the Hindoo safely to her destination, and that 'It was my duty to do what in my judgment would safeguard the Hindoo.' He also admitted that he had authority to give an emergency war time order to any Allied merchant vessel. Nothing was offered by the United States to controvert this testimony as to the escort's duty. The escort's commander was aware of the danger

* Italics are ours.

to his escortee and of his own duty and authority to take measures to avoid it. But aside from the abortive attempt to signal the Australia Star and the directing of his searchlight on the Hindoo, at the last minute, he did nothing to avoid this collision. In our opinion this was negligence which contributed to the disaster."

The Facts and Issues

As the pertinent facts have been concisely and accurately stated in the brief for the S.S. "Australia Star" they need not be restated here. The brief for the petitioner seeks to give the impression by extraneous references to a 1949 communication from the Chief of Naval Operations to the Judge Advocate General and an "Escort Standard Sortie Order" bearing a United States Printing Office date of 1949, neither of which has any evidentiary connection with the case, that the sole duty of the "P.C.616" was to furnish escorted vessels with such protection as resulted from attacking submarines discovered in their vicinity. The case, however, must stand upon the evidence presented, which is very fairly summarized by the passage above quoted from the lower court's opinion. The evidence so summarized was not only uncontradicted in the Record, but is entirely consistent with the circumstances under which the "Hindoo" was being convoyed. The relationship of the "P.C.616" to the "Hindoo" was totally different from the relationship of a roving patrol boat accompanying a large convoy.

The argument of the petition relies heavily upon the findings of the District Court that neither the "Hindoo"

nor the "Australia Star" was induced by the presence of the "P.C.616" to navigate less carefully, and that the presence and action of the "P.C.616" put the "Australia Star" in no worse position than if the "P.C.616" were not there at all. Those findings, which are actually conclusions of fact, should be considered not only with reference to the testimony summarized by the Court of Appeals, but in the light of the District Court's own finding No. 10 (Record, p. 607), which contained the following statement:

> "Ten minutes before collision a green light was seen. The following minutes were consumed in a search in the signal code for the meaning of the green light, and the mistaken report that it was an aircraft warning signal from the PC-616."

Finding No. 10 is based upon the following testimony from the master of the "Hindoo":

> "A. Yes. I figured it was about 15 minutes after I came on the bridge and then I just searched the horizon, and then I saw the silhouette of the escort vessel.
>
> * * * * *
>
> Q. What was the next thing that you saw, Captain, and when? A. Well, later on, I would say about five minutes later, I saw a green light turning up in the same direction." (p. 459, fols. 1376-7)
>
> * * * * *
>
> "A. Well, I was waiting for another signal because they told me that green light was from the escort and it used to wait a few moments so it could switch other lights on. But when it didn't come, I told the third mate to go in and look up in the signal book what that signal means, and he came out and told me that the signal meant an aircraft is approaching." (p. 460, fol. 1378)

As stated by the Court of Appeals, the "Hindoo" was steering the course and proceeding at the rate of speed ordered by the "P.C.616", was blacked out in accordance with instructions enforced by the "P.C.616", and kept the "P.C.616" under observation for the purpose of receiving emergency orders from her. Since the "P.C.616" was equipped with radar and the "Hindoo" was not so equipped, the latter had to rely upon the "P.C.616" to inform her of invisible dangers whether those dangers were caused by hostile aircraft or friendly blacked out vessels. Consequently, when, without warning, the navigators of the "P.C.616" saw the green light of the "Australia Star" come into view in approximately the same relative position off their port bow in which they had last seen the "P.C.616", it was not entirely surprising that the navigators of the "Hindoo" mistook the green light for a signal from the "P.C.616". Far from being an outsider to the collision, the presence and relationship of the "P.C.616" to the "Hindoo" actually misled the "Hindoo" and contributed to the collision.

The petition on page 13 makes the following statement:

> "The sole duty assumed by the P.C.616, and the only reason for its presence, was the military obligation to protect the Hindoo from enemy attack."

That statement is apparently not intended to apply uniquely to the present case since it is contrary to the evidence in the present case, but appears by its context to have application to all wartime convoy situations. The following hypothetical case is suggested as a test of the principle contended for in the petition:

Suppose two large convoys proceeding in opposite directions, blacked out, meeting head and head. Suppose each convoy to be escorted by a vessel proceeding ahead and giving explicit orders as to the course and speed to be maintained by the vessels in its convoy. Suppose further, that none of the merchant vessels in either convoy is equipped with radar but that each escorting vessel is equipped with an efficient radar and that the navigating officers on each escorting vessel have full knowledge of the convoy approaching from the opposite direction. Assume that neither escort vessel gives any orders to the vessels in its convoy for a change of course and gives no warning of the convoy approaching from the opposite direction. Assume that the vessels in the two convoys meet head and head and that collisions occur between them.

Would it be held, in the hypothetical case just stated, that neither escorting vessel was to blame for the collision and that the only duty of each escort in the circumstances was to protect its convoy from enemy submarines?

The issue in the present case, just as the issue in the hypothetical case stated, is an issue of fact. In the case *of Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, this court held the United States liable under the Public Vessels Act, 46 U.S.C.A. Section 781, et seq. for its failure properly to perform its duty to set a safe course for the vessel which was under orders to follow the course set. It is true that the analogy of tug and tow does not have application to the relationship that existed between the "P.C.616" and the "Hindoo". Nevertheless, the conditions and oral instructions from the "P.C.616" under which the

"Hindoo" was proceeding, made the latter vessel peculiarly dependent upon the orders from her escort. The present case does not involve a broad principle of an escorting vessel's liability for the navigation faults of her convoy any more than the *Canadian Aviator, Ltd.* v. *United States, supra,* involved such a principle. The only question involved is the relationship which existed between the vessels under the evidence of the present case and the duties devolving upon the "P.C.616" out of that particular relationship. Admittedly the "P.C.616" permitted the "Hindoo" to proceed without warning into collision, although knowing that the "Hindoo" was proceeding blacked out under orders from the "P.C.616", on a course and at a speed set by the "P.C.616", and that the "Hindoo" was keeping the "P.C.616" under observation for any change of course, and further knowing for a considerable time before the collision that unless the "Hindoo" made an alteration in her course and speed a collision would occur.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Dated New York, August 18, 1949.